

COMMONWEALTH OF MASSACHUSETTS
EXECUTIVE OFFICE OF ENVIRONMENTAL AFFAIRS
DEPARTMENT OF ENVIRONMENTAL PROTECTION
ONE WINTER STREET, BOSTON, MA 02108 617-292-5500

March 19, 2007

In the Matter of
Town of Lexington

Docket No. 2006-184
File No. UAO-NE-06-6W005
Lexington

RECOMMENDED FINAL DECISION

The petitioner, Mr. Thomas Costello, requested an adjudicatory hearing concerning the issuance of a Unilateral Administrative Order (UAO) issued to the Town of Lexington by MassDEP. The Order found the Town had performed work in a Bordering Vegetated Wetland and Buffer Zone without the filing of a Notice of Intent (NOI) or Request for Determination of Applicability. It required the Respondent (Town of Lexington) to “cease and desist all activity at the site that is in violation of the [Wetlands Protection] Act, including, but not limited to mowing in the BVW and Buffer Zone.” UAO, ¶9. The Order also notes that the Respondent must file a Request for Determination of Applicability or Notice of Intent and receive a final Determination or Order of Conditions prior to performing any future activity on the site in any area subject to jurisdiction. Id.

The petitioner’s claim requests the following relief: “restoration of the destroyed wetlands and fine upon the individuals.”¹ I considered this a request for additional enforcement

¹ The petitioner’s claim also includes the following assertions for which no specific relief is requested: the Conservation Commission met and/or voted in secret; the petitioner’s rights to request a Superseding Order were summarily foreclosed; the petitioner’s property is near “Tier II contamination” and the wetlands could have abated contamination of his domestic artesian well; the Enforcement Order only requires the violator not to repeat the cited

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measures against the Town, and ordered the petitioner to clarify the relief he sought and show cause why, if enforcement was his goal, his claim should not be dismissed as unavailable through an adjudicatory hearing.

The petitioner responded, and filed a number of separate motions related to discovery, case management, and for recusal of the Presiding Officer.² The Department and the Town of Lexington then both moved to Dismiss the Appeal, and the petitioner has opposed the motions. I now recommend dismissal of the Claim for failure to state a claim upon which relief can be granted.

Failure to State a Claim

A claim may be dismissed for failure to state a claim upon which relief can be granted when, after presuming all facts alleged in the notice of claim to be true, the claim does not present any grounds for relief. 310 CMR 1.01(11)(d)2. Such a motion tests the legal sufficiency of the claim, or whether the relief sought can be provided. In the Matter of Lawson, Docket No. 2000-111, Recommended Final Decision (February 2, 2001). Claims may be dismissed as legally insufficient if it appears beyond all doubt that the petitioner is entitled to no relief available. Matter of Sheridan, Trustee, Brookmeadow Development Trust, Docket No. 98-001, Ruling on Motion to Dismiss (June 2, 1998).

The petitioner's initial Claim and response to the Order to Show Cause reiterated that he seeks additional enforcement action in the form of a restoration order and penalty assessment

activity; the petitioner was advised by MassDEP staff to request relief of the violator and that he has no standing to appeal.

² A copy of the full list of docketed pleadings in this case is attached hereto.

notice. Both are beyond the scope of any relief that might be required as a result of an adjudicatory hearing.

Enforcement

The decision to take enforcement action for violations of the Wetlands Protection Act is discretionary, and is not subject to a right of review through an adjudicatory hearing. Both the Wetlands Protection Act regulation and the Civil Administrative Penalty regulations use discretionary language to describe the agency's enforcement authority. 310 CMR 10.08 provides that "[w]hen....the Department determines that an activity is in violation of M.G.L. c. 131, s. 40, 310 CMR 10.00 or a Final Order, the....Department....may issue an Enforcement Order...." (emphasis added) Similar discretionary language is used in the penalty regulations. 310 CMR 5.10 provides "A Penalty may be issued only for failure to comply that [meets the listed criteria]" (emphasis added). Matter of Town of Westwood (Westwood Public Schools), Docket No. 2001-186, Motion Decision, (June 11, 2002) (citizen group's challenge to decision not to issue an enforcement order or assess a penalty may not be reviewed in an adjudicatory hearing on wetland permit); Matter of Augustine Luongo, Trustee, Luongo Realty Trust, Docket No. 98-053, Final Decision (March 4, 1999), Reconsideration Denied (April 16, 1999); Matter of Edward McLaughlin, Trustee ETM Realty Trust, Docket No. 97-043, Final Decision (September 24, 1997).

Petitioner's Response cited provisions of the wetlands rules that describe appeal rights for permitting decisions, and the preface to the regulatory revisions made in 2004 concerning abutters who have participated in the permitting process. Those rules are inapplicable to the

instant UAO. After the Department determined a violation of the Act had occurred through the described mowing activity, it issued the UAO which did not require restoration, but required all such unpermitted activity to end. The decision not to undertake additional enforcement is within the agency's authority, and is not reviewable here.

Although Mr. Costello contends that a different remedy - restoration and a penalty - should have been required or imposed by the agency, the selection of case specific remediative measures has been left to the particular expertise of the agency by the legislature, and is entitled to considerable deference. Matter of Augustine Luongo, Trustee, Luongo Realty Trust, Docket No. 98-053 Final Decision (March 4, 1999); Matter of Town of Westwood (Westwood Public Schools), Docket No. 2001-186, Motion Decision, (June 11, 2002) ["the Department's decision not to issue an enforcement order or assess a penalty is a matter within the Department's enforcement discretion and may not be reviewed [through an administrative appeal]"; Matter of Robert Algierie Jr., Docket No. 2003-082, Recommended Final Decision (March 10, 2004), Adopted by Final Decision (April 8, 2004) ["enforcement decisions under the Act, including the decision whether to take any action at all, are left to the discretion of the Commission or DEP"]. See also Thomas M. Dicicco v. Dept. of Environmental Protection, 64 Mass. App. Ct. 423, 427-8 (2005). In Dicicco, the plaintiff residents group contested the terms of a Consent Order requiring wetlands replication, and sought restoration of illegally filled wetlands. The Superior Court's dismissal was affirmed, as the discretion granted to the agency in making enforcement decisions is broad, and the remedy agreed upon with the violator was within the discretion of DEP to choose.

General Laws c. 131, §40 thirty first par., provides neither a mandatory nor a definite standard for enforcement actions – only that a violator “may be required to restore the

property to its original condition” (emphasis added). In any event the scope and nature of restoration and replication are considerations within the discretion of the DEP.

Id. at 428.

Like the claim from the third party plaintiff in Diccico, the alternative enforcement remedies sought by the petitioner is unavailable. As to the remedy chosen by the agency, that enforcement decision is properly within the agency’s expertise to evaluate. No enforcement can be compelled from the agency through an adjudicatory appeal, and I recommend dismissal of the enforcement claims under 310 CMR 1.01(5)(a)(15.f.v. for failure to state a claim upon which relief can be granted.

Property Damage

The petitioner also recites damage from the illegal activity in the wetlands area to his private well, caused by an increased degree or severity of contamination from a nearby site regulated under M.G.L. c. 21E. If the petitioner’s statements concerning property damage are requests for administrative relief from this agency, they cannot be raised through an appeal of a wetlands Enforcement Order. Neither property damage nor property disputes can be adjudicated before this agency in an adjudicatory appeal under the Wetlands Protection Act. Tindley v. Dept. of Environmental Quality Engineering, 10 Mass. App. Ct. 623 (1980); Matter of Augustine Luongo, Trustee, Luongo Realty Trust, Docket No. 98-053 Final Decision (March 4, 1999). The petitioner has not presented a property damage claim upon which relief can be granted, and I recommend their dismissal under 310 CMR 1.01(5)(a)(15.f.v.

Participation in a Permit Proceeding

The petitioner also claims a deprivation of the right to participate in the wetlands permitting process. It is true that the activity described in the UAO was not the subject of a permit application (Notice of Intent or Request for Determination of Applicability), which normally would involve some degree of public participation. This omission, prior to the activity taking place, is the foundation of the violation cited in the agency's enforcement order. If the Town had filed a Notice of Intent or Request for Determination the petitioner would have been able to participate. Future activities within jurisdictional areas are subject to the procedural requirements of the Act, and the Department chose to address the violation which occurred in a UAO with cease and desist requirements. It was within the agency's power to choose such a response and not require an "after the fact" filing given the circumstances of the violation. The petitioner's requested relief— opportunity to participate in a permit proceeding that did not occur - cannot be granted.³ As no requested relief can be obtained through this adjudicatory appeal, I recommend dismissal of the participation claims under 310 CMR 1.01(5)(a)(15).f.v. for failure to state a claim upon which relief can be granted.

Discovery Motions and Recusal

Although not dispositive, I add a note to this decision on the petitioner's discovery motions that were not decided, and his motion for my recusal from this case. In furtherance of conserving administrative resources, I did not rule on the petitioner's Motion to Compel Discovery, Motion for a View, Motion to Sequester Witnesses and for a Stenographer, Motion to

³ To the extent the petitioner is seeking the opportunity to participate in the deliberative process within the agency for making enforcement decisions, no opportunity for public participation in these discretionary determinations is required under the Act or its regulations.

Produce Witnesses, Tentative Decision Request, Motion to Take Administrative Notice re: RTN – 3- 26382, Request for Directives and Standing Orders, Motion to Order Plan Preparation, Motion for DEP to Show Cause, Motion for Discovery, Motion for Conservation Commission to Show Cause, Demand for Hearing Officer Qualifications, and Motion to Strike while the potentially dispositive question of whether this forum could legally grant the relief requested remained unresolved. These non-dispositive motions, should the case have proceeded, would have been addressed as part of the preliminary steps leading to hearing. As the relief sought by the petitioner cannot be obtained through such an administrative hearing, and I now recommend dismissal on those grounds, no decisions on these motions are necessary.

With respect to the petitioner's Motion for my qualifications and recusal from this case for reasons of bias, I hereby deny both motions. The petitioner has relied on my issuance of an Order to Show Cause, and alleged irregularities in the docketing of filings as evidence of bias on my part. I am qualified by virtue of my appointment as a Presiding Officer pursuant to 310 CMR 1.01(1) and the issuance of the Order to Show Cause is a step often taken to clarify a petitioner's Claims, and is not unusual in the prescreening stage of the agency's appeals. I do not have any bias for or against the petitioner or the Town of Lexington.

The manner in which the Case Administrator docketed Mr. Costello's numerous submissions is no indication that his claims were prejudged or not carefully considered. All the petitioner's motions he notes as missing were included in the record but were not separately docketed. The other "missing" filings were the Order to Show Cause which was inadvertently not docketed, and two letters dated February 5, 2007 from Mr. Costello to the MassDEP

Commissioner and the Executive Office of Environmental Affairs which were not submitted or served on the record, but were later attached to his Motion to Strike.⁴ All of the submissions he noted as absent from the docket are now listed separately in the docketing system, and all were and are included in the record of this case. In accordance with 310 CMR 1.03(6) the petitioner's Motion for Recusal and all materials submitted in support and opposition are included in the record. For the above reasons, the Motions are denied.

NOTICE

This decision is a Recommended Final Decision of the Presiding Officer. It has been transmitted to the Commissioner for her Final Decision in this matter. This decision is therefore not a Final Decision subject to reconsideration under 310 CMR 1.01(14)(e), and may not be appealed to Superior Court pursuant to M.G.L. c. 30A. The Commissioner's Final Decision is subject to the rights of reconsideration and court appeal and will contain a notice to that effect.

Because this matter has now been transmitted to the Commissioner, no party shall file a motion to renew or reargue this recommended final decision or any part of it, and no party shall communicate with the Commissioner's office regarding this decision unless the Commissioner, in her sole discretion directs otherwise.

⁴ The letters have as their subject caption "Unanswered Complaint About Your People; Docket No. 2006-184", and are likely impermissible ex-prate communications. 310 CMR 1.03(7). Although these letters were not directly sent to the Office of Appeals and Dispute Resolution or the other parties in the case, they are now part of the record as attached to the petitioner's Motion to Strike but are not docketed separately.

This final document copy is being provided to you electronically by the
Department of Environmental Protection. A signed copy of this document
is on file at the DEP office listed on the letterhead.

Ann Lowery
Presiding Officer

Adopted by Acting Commissioner Arleen O'Donnell March 23, 2007.